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Supreme Court of the United States
OCTOBER TERM, 1976

No. 76- 76-308

MELVIN JOHNSON, SR., ODESSA MARIE MADRE, JOHN S. MATTHEWS, CLYDE N. JONES, AND GEORGE BYERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners Melvin Johnson, Odessa Marie Madre, John S. Matthews, Clyde N. Jones and George Byers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 21, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the United States District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered June 21, 1976. It appears in the appendix.* A petition for rehearing and suggestion for rehearing *en banc* were both denied by orders of July 30, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia has held that court-authorized wire interceptions of petitioners, upon which their gambling convictions are based, were undertaken in full conformance with both federal and District of Columbia wire-interception statutes. The questions presented are:

1. Where the Government used as trial evidence the fruits of gambling communications seized during a wiretap for narcotics communications, was the Government's failure to file any application with any court for retroactive approval of the "other-crimes" seizure a violation of 18 U.S.C. 2517(5) or 23 D.C. Code 548(b)?

2. Where the Government failed to list as targets for its interception petitioners Byers, Johnson and Jones, were the target identification provisions of 23 D.C. Code 547(a)(2)(D) violated?

3. Where the Government failed to notify petitioners Byers, Jones and Matthews by formal inventory of the fact of their interception by the court-authorized tap, were the notice provisions of 23 D.C. Code 550(a) violated?

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* These cases were consolidated by the Court of Appeals by order of July 7, 1975.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2517(5).

> "When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."

18 U.S.C. 2518(1)(b)(iv).

> "[Each application shall include . . . a full and complete statement of the facts and circumstances relied upon by the applicant . . . including] . . . (iv) the identity of the person, if known committing the offense and whose communications are to be intercepted;"

23 D.C. Code 548(b).

> "When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized by this subchapter, intercepts wire or oral communications relating either to offenses other than those specified in the order of authorization or to offenses other than those offenses for which interception was made pursuant to subsection (a) of this section, he shall make an application to a judge as soon as practicable for approval for disclosure and use, in accord-

ance with section 23-553, of the information intercepted."

23 D.C. Code 547(a) (2) (D).

> "[Each application shall include . . . a full and complete statement of the facts and circumstances relied upon by the applicant . . . including] . . . (D) the identity of the person, if known, who committed, is committing or is about to commit the offense and whose communications are to be or were intercepted;"

23 D.C. Code 550(a).

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 23-548 which is denied, or the termination of the period of any order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine, in his discretion, are necessary in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application for an order of approval which was denied;
>
> (2) the date of the entry of the order or the denial of the application for an order of approval;
>
> (3) the period of authorized, approved, or disapproved interception; and
>
> (4) whether during the period wire or oral communications were intercepted."

STATEMENT OF THE CASE

By indictment filed June 28, 1974, petitioners Melvin Johnson, Sr., Odessa Marie Madre, John S. Matthews, Clyde N. Jones and George Byers were each charged in a two-count indictment with certain gambling offenses.[1] After a nonjury trial upon stipulated evidence before United States District Court Judge William B. Jones on January 24, 1975, each petitioner was found guilty.[2] Following imposition of sentence on April 4, 1975, a timely notice of appeal was filed with the United States Court of Appeals for the District of Columbia Circuit.

By their appeal, petitioners sought to raise various issues relating to the manner by which evidence supporting their convictions was obtained. That evidence was essentially wire-interception evidence. It was ostensibly secured in conformance with the provisions of the local and federal wiretapping statutes, 23 D.C. Code 541 *et seq.* and 18 U.S.C. 2510 *et seq.* The degree of conformance by the Government with these provisions constituted the central focus of petitioners' appellate challenge. On June 21, 1976, a panel of the United States Court of Appeals for the District of Columbia Circuit rejected that challenge and upheld the manner by which the Government secured the interceptions in this case.

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[1] Operating an illegal gambling business, in violation of 18 U.S.C. 1955, and operating a lottery, in violation of 22 D.C. Code 1501.

[2] The nonjury trial on stipulated evidence was a pro-forma affair undertaken in lieu of a plea disposition to allow petitioners to preserve their right to appeal various Fourth Amendment issues. All petitioners were convicted of the D.C. Code offense of operating a lottery except petitioner Johnson, who was convicted of the federal gambling offense. This disposition had earlier been agreed to by the parties and is memorialized in Judge Jones' Order of January 3, 1975 and his Judgment of January 24, 1975.

A. The Wiretap Investigation

Petitioners were formally arrested in October 1973 and charged with a series of gambling violations. The bases for their arrests arose from a wire interception that operated in September 1973 upon an alleged gambling office located at 1900 16th Street, N.W. The route that led investigators to this gambling office and to petitioners, however, began months before and had nothing to do with the offense of gambling.

The investigation began in April 1973 with petitioner Odessa Marie Madre suspected of involvement in narcotics dissemination and smuggling. Members of the Metropolitan Police Department (MPD) Narcotics Squad obtained a pen register device and thereafter a wire interception of the home telephone of Ms. Madre, on Aspen Street in the District of Columbia, for suspected narcotics communications. On April 30, 1973, United States District Court Judge Barrington Parker signed an order permitting installation of the pen register device on the Madre home telephone for a period of 21 days. Thereafter, on July 27, 1973, Judge Parker approved a federal wire interception application for the Madre home telephone, again submitted by members of the Narcotics Squad. A 21-day tap was authorized during which particularly-described wire communications relating to the suspected narcotics smuggling operation were lawfully to be seized.

Armed with this order, the Narcotics Squad began to monitor the Aspen Street Madre telephone. They overheard few, if any, narcotics communications. Instead, the Narcotics Squad overheard and seized a voluminous number of communications having to do with illicit gambling. By the Government's own concession, only gambling communications were seized throughout the final nine days of the Madre tap. (Government's Appellate Brief at 7.) The Madre tap terminated on August 17, 1975.

As a result of the seizure of a wide range of telephone calls outside the scope of Judge Parker's order, the Narcotics Squad ascertained that petitioner Madre appeared to be engaged with other persons in an illicit lottery. The gambling communications supporting this thesis were transmitted to the Gambling Squad of the MPD, which then took over the investigation. No effort was made under either the federal statute [in particular 18 U.S.C. 2517(5)] or the local statute [in particular 23 D.C. Code 548(b)] to seek retroactive court approval for the seizure and use of the "other-crimes" gambling communications that formed the foundation of the new direction of the investigation.

Utilizing these gambling communications, the Gambling Squad requested an order authorizing the installation of a pen register device on 1900 16th Street, N.W., an address revealed by the Madre tap. The Gambling Squad conceded in its application, which was again made to Judge Parker, that "it was not until the installation of the (July 27th Aspen Street tap) that the discovery of (the 16th Street gambling office) and its location was made." On August 18, 1975, Judge Parker authorized a 20-day pen register to be installed on the new 16th Street address.

On September 28, 1973, the Gambling Squad applied for a wire interception of the 16th Street telephones. Its application was lifted almost verbatim from the August 18 pen register application and relied almost exclusively on the other-crimes gambling seizures from the Madre narcotics tap.

The gambling application of September 28, however, was addressed to Chief Judge Harold Greene of the Superior Court of the District of Columbia, a new entrant to the investigative chronology. The Government's application to Chief Judge Greene pointedly omitted all reference to the fact that the gambling communications

on which it rested were seized during the Madre narcotics tap, an interception that was directed solely at narcotics activity. In addition, the Government neglected to advise Chief Judge Greene that it had never filed any application in any court for authorization and approval to use the other-crimes gambling communications in the new investigation.

The application of September 28, 1973 identified as a target of the interception only petitioner Madre. Other potential targets were denominated "unknown." On August 18, however, in its pen register application to Judge Parker, the Government had specifically identified petitioner Byers, along with Madre, as targets and had averred probable to believe him such. In the September 28 application itself, substantial information rising virtually to probable cause was averred as to petitioners Johnson and Jones, although neither they nor Byers were identified to Chief Judge Greene as targets.

Unaware that the gambling communications relied on by the Government were seized during a narcotics tap and that no subsequent judicial approval of the seizure had ever been rendered, Chief Judge Greene routinely approved the September 28 tap application as submitted by the Government. The sole target identified was petitioner Madre; neither Byers, Jones nor Johnson was specified in Chief Judge Greene's order as a target of the interception although substantial inculpatory information was known as to all of them and as to Byers at least the Government in other pleadings to Judge Parker had already deemed him a known participant in the suspected enterprise to a probable cause certainty. (Chief Judge Greene was also not advised of this prior judgment by the Government.)

As a result of the 15-day interception of the telephones at 1900 16th Street, N.W., petitioners' voices were overheard and their communications seized. On October 12

and during the days that followed, petitioners were arrested and various physical items seized from them and from their premises. Their formal prosecution for gambling offenses began shortly thereafter.

B. The Pretrial and Trial Process

Pursuant to an order signed by Chief Judge Greene in December 1973, registered letters were sent on January 4, 1974 to twenty-six persons listed as subscribers to telephone numbers called from the tapped 16th Street telephones. The letters informed their recipients that conversations had been intercepted from those two telephones during the period of the tap. Included in this list of purported recipients of these notice letters were petitioners Madre, Johnson and Jones.

Letters were concededly not sent either to petitioners Byers or Matthews. (See Governments' Opposition to Suppression Motion at 7.) Moreover, at the December 9, 1974 suppression hearing, the Government acknowledged that it received back an unsigned receipt from the registered letter sent to petitioner Jones. (H. Tr. 21-22.) There is nothing in the record to indicate that petitioner Jones was ever served with a formal inventory. The Government also conceded that it had definite knowledge shortly after the tap ended that the conversations of Byers and Matthews had been intercepted and that it knew of these putative defendants at that time; it described its failure to list them as persons to receive inventory notice in its list submitted to Chief Judge Greene as "an oversight." (H. Tr. 67.)

All petitioners were indicted on June 28, 1974. They were arraigned on August 5, 1974. During the months that followed, petitioners challenged the legality of the court-ordered wire interceptions on which their prosecutions were based. These challenges were ultimately rejected by the trial court. By opinion of June 21, 1976,

a panel of the United States Court of Appeals for the District of Columbia Circuit held that neither federal nor local wiretapping statutes had been violated during the course of petitioners' investigation. Following the denial of their petition for rehearing and suggestion for rehearing *en banc* on July 30, 1976, petitioners sought issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents three important federal questions concerning procedures by which court-authorized wire interception under the federal statute and its local analogue in the District of Columbia are carried out. First, it presents the question of the proper procedures to be followed by monitoring agents who come upon other-crimes communications during the course of an interception and the degree to which the command of retroactive court approval for such seizures embodied in 18 U.S.C. 2517(5) and 23 D.C. Code 548(b) is to be given full force and effect. Second, it presents the recurring question of the extent to which target identification provisions of the District of Columbia wiretap statute require the identification of all persons known to a probable cause certainty to be subjects of the forthcoming tap. Third, it presents the question of the appropriate sanction under the notice provisions of the District of Columbia wiretap statute where the Government has neglected to provide certain wiretap subjects the required formal notification of their overhearing.

It is petitioners' contention that each of these three important federal questions has been resolved erroneously by the District of Columbia Circuit Court of Appeals or has been resolved in a fashion that conflicts with decisions of this Court.

I. The decision of the District of Columbia Court of Appeals that the Government complied with 18 U.S.C. 2517(5) and 23 D.C. Code 548(b) erroneously resolves an important question of federal law that has not been and should be decided by this Court.

This case involves the failure of the Government to comply with basic provisions of the District of Columbia and federal wiretapping statutes that set forth preconditions to the use of communications relating to other crimes come upon during a wire interception. These preconditions, involving expeditious and formal application for approval of the use and dissemination of such communications, are set forth in 18 U.S.C. 2517(5) and 23 D.C. Code 548(b). The problem of compliance with these provisions is an important federal question that has not been settled and should be settled by the plenary consideration of this Court.

The fact pattern that underlies the problem of statutory compliance with the other-crimes provisions of the wiretapping statutes appears clearly from the record. United States District Court Judge Barrington Parker authorized the Government to conduct a wire interception beginning July 28, 1973 during which only communications relating to the offense of unlawful narcotics dissemination could be seized. Officers executing the tap, however, went far afield and listened to and recorded voluminous communications outside this mandate, in particular huge numbers of gambling communications. These gambling communications led directly to a gambling pen register, authorized by Judge Parker on August 18, 1973, and thereafter to the September 28, 1973 gambling wire interception authorized by Chief Judge Greene that provided the evidence at the trial of this case. The Government never advised Chief Judge Greene that the gambling communications it relied on were seized pursuant to a narcotics tap or that it had failed to file any applica-

tion in any court for approval of the manner by which the gambling communications were seized during the narcotics tap, either pursuant to Section 2517(5) or Section 548(b).

By its opinion of June 21, 1976, a panel of the United States Court of Appeals for the District of Columbia Circuit found that notwithstanding these failures of compliance neither the federal nor the local wiretapping statutes had been violated. We respectfully suggest that the panel's opinion miscomprehends the purpose of these important provisions and the key protections they provide.

In an effort fully to comply with the particularity demands of *Berger* v. *New York*,[3] and to assure that no "roving commission to 'seize' any and all conversations" [4] ever issue, the legislative framers of the federal statute constructed a set of rigorous and complete statutory preconditions to wire interception use.[5]

The draftsmen correctly anticipated that situations would arise in which monitoring authorities would overhear communications relating to an offense wholly different from that specified with particularity in the warrant

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[3] 388 U.S. 41, 56 (1967).

[4] *Id.*, at 58 citing *Marron* v. *United States*, 275 U.S. 192 (1927).

[5] Section 2518(1)(b) of Title 18 makes plain that the warrant application must contain a "full and complete statement of the facts and circumstances relied upon by the applicant," including "a particular description of the type of communications sought to be intercepted" [Section 2518(1)(b)(iii)] and the identity of the person, if known, to whom the communications to be seized belong [Section 2518(1)(b)(iv)]. Similar specification of the communications to be seized and their speakers is found in Section 2518(3) and Section 2518(4).

Each of these provisions, in the words of the framers of Title III, "reflects the constitutional command of particularization." (Senate Report 1097, April 29, 1968, accompanying Omnibus Crime Control and Safe Streets Act of 1968, 90th Cong., 2nd Session at 101.)

papers. The seizure of such communications (as by their overhearing or recordation) would bring the monitoring officers within that uncertain area of law dealing with the seizure of items unspecified in search warrants. See, *e.g.*, *United States ex rel. Nickens* v. *LaVallee*, 391 F.2d 123 (2d Cir. 1968); *Seymour* v. *United States*, 369 F.2d 825 (10th Cir. 1965); *United States* v. *Eisner*, 297 F.2d 595 (6th Cir. 1962); *Johnson* v. *United States*, 293 F.2d 539 (D.C. Cir. 1961). In judging the propriety of seizure of an item unspecified in a warrant, courts are called upon to make hard decisions about the proper scope of the search, the extent to which the item unspecified but seized was lawfully come upon in plain view, and the degree to which the executing officers may have acted as if they possessed a "roving commission" proscribed by *Marron*. Recognizing the hard questions to be faced in this area, the draftsmen of Title III set up specific procedures for those cases in which communications relating to crimes wholly outside the particularized warrant were seized. Those procedures are described in Section 2517(5).

The Senate Committee emphasized that such evidence of other criminality unspecified in the tap application, and the fruits of that evidence, may be used by the Government during a criminal prosectiuon "*only* when authorized or approved by a judge of competent jurisdiction . . . (who) finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter." (Emphasis supplied.) Senate Report, *supra*, note 5, at 100. The Government's application is thus required to show that the original order was lawfully obtained, that it was sought in good faith, and that the interception was lawfully executed in every regard and was not overly broad. *Id.* Such an application must be filed as soon as practicable. The Senate Committee ends by citing *Marron* and *Eisner* as cases on each end of the spectrum upon which the judge to whom

an application is made for retroactive approval of seizures outside the warrant must render his decision. *Id.*

The D.C. statute, drafted in reliance on the provisions of Title III, contains an even more rigorous requirement for judicial approval of the seizure of undesignated communications. Whereas the federal statute makes such approval necessary only to allow formal prosecution to go forward and the evidence (or its fruits) to be used in court, Section 548(b) of the local statute requires court application and approval "as soon as practicable" in every case where disclosure to anyone is sought.

Indicative of the importance of these provisions is *United States* v. *Moore*, 513 F.2d 485 (D.C. Cir. 1975). In *Moore*, co-appellant Robert Davis made the argument that the Government had violated Section 548(b) of the local statute because it had sought to intercept communications relating to "local gambling activities" and had actually intercepted communications relating to "federal gambling offenses," which it turned over to the FBI. Since a "different" offense was involved, a Section 548(b) application for approval of dissemination and use was assertedly required. *Id.* at 501. Appellant Davis' argument to this effect was rejected. Quite obviously, local and federal gambling offenses are almost identical. Moreover, the judge authorizing the tap (coincidentally Chief Judge Greene) was aware of FBI participation and could thus have appreciated how integrated the local and federal offenses might be. And in this regard, the Court rested heavily on the fact that the Government's tap application candidly acknowledged FBI participation, thus giving notice of an intention to intercept federal gambling calls.

Each of these three conditions is absent in this case. First, the wiretap application of September 28 is in no sense candid; it avoids the Section 548(b) problem by omitting to note that the key gambling calls on which it

was based were seized from a tap allowing only the seizure of narcotics calls and that no subsequent authorization for dissemination and use was ever filed. Second, as a result Chief Judge Greene was kept in the dark. Unlike *Moore*, he had no inkling of the problem, the facts of the prior investigation or the apparent failure of the Government to comply with Section 548(b) at the time it was using the gambling calls to induce him to approve the September 28 interception request. And third, of course, the need for invocation of Section 548(b) in this case is manifest. The gambling communications seized from the July 27 narcotics tap truly related to an offense "other than those specified in the order of authorization" and were clearly a different class of communication for which authorization to seize had never been granted.

So this violation is really everything that the *Moore* violation was not. It is clear, substantial, unrevealed to the judge authorizing the interception and totally unknown to him at the time the interception was approved. The Court of Appeals in *Moore* noted that when noncompliance with Section 548(b) is "used to circumvent court approval in situations where the evidence obtained from the surveillance was different from that contemplated by judicial order," then it will have "substantial reservations" about the propriety of such practice. *Id.* at 502.

Indeed, the Seventh Circuit, in *United States* v. *Brodson*, 528 F.2d 214 (7th Cir. 1975), recently approved the dismissal of an indictment where the Government had failed to file the requisite application for approval under Section 2517(5) until shortly before trial. The case involved a prosecution under 18 U.S.C. 1084 for wagering in interstate commerce using wire-interception communications obtained during a tap for violations of 18 U.S.C. 1955. The Seventh Circuit found sufficient dissimilarity in the offenses and communications supporting their proof that it held the other-crimes provisions of Section 2517

(5) came into play. The failure of the Government to file a timely application under that section was held a violation of substantial magnitude. Associate Justice Clark, speaking for a unanimous court, stated:

> By inserting Section 2517(5) into the Act, the Congress obviously intended to require that the Government submit the tape of its wiretaps to a neutral judge so that he might determine whether the interceptions were the inadvertent product of a legitimately obtained wiretap or the electronic equivalent of the type of illegal evidence formerly obtained under the supposed authorization of a "general search warrant." Here, the Government's claim, that the authorizations applicable to the Section 1955 violations were also relevant to Section 1084 violations, should have been tested by submitting them to a judge in accordance with the rationale of Section 2517(5). This the Government failed to do within the time requirement of "as soon as practicable" that the Section specifies. Moreover, without submitting to the requirements of Section 2517 (5), the Government disclosed the intercepted conversations to the Grand Jury. *Id.* at 215.

Petitioners case is, if anything, stronger than appellant Brodson's. For here, as we have indicated, the communications were truly dissimilar and no application for retroactive approval of their use was ever filed.

The D.C. Circuit panel advances several reasons to support its view that here full compliance was had with both the federal and the local statutes.

First, the panel determines that "since no recordings for the July 27 investigation were" submitted in evidence, there was no need under Section 2517(5) for an expeditious application authorizing use of other-crimes information. (Appendix at 12a.) The panel has simply misread the statute. The statute specifies that other-crimes conversations "and *any evidence derived therefrom* may be used" at trial only where the appropriate authorizing application is expeditiously filed. The panel has omitted the phrase "any evidence derived therefrom" in the course of its analysis. It is undisputed that the other-crimes gambling communications seized during the narcotics tap gave rise to the September 28 gambling tap and the evidence introduced against petitioners at trial. The chain of derivation is direct and clear. The panel indeed concedes that had "actual other crimes evidence from that tap been introduced at the trial, the statute would have required previous application for judicial permission." (Appendix at 12a.) By any reasonable analysis, the September 28 tap, which was introduced, constitutes evidence "derived" from the "contents" of the July 27 tap. As such, it qualifies for the protections afforded by Section 2517(5).

Second, the D.C. Circuit reasons that Judge Parker received a pen register application on August 18 that revealed that the narcotics tap had obtained massive gambling communications. The panel states that Judge Parker's approval of the pen register application involved him in "precisely the issue which would have been decided on a special application under Section 2517(5)." The panel also reasons that the interim reports filed during the narcotics tap with Judge Parker (which revealed the seizure of massive gambling calls) also acted as a check. Together, the interim reports and the pen register application to Judge Parker are said to have provided the functional equivalent of a Section 2517(5) application. (Appendix at 12a-13a.) The panel here misconceives the purpose of Section 2517(5) and the inquiry it mandates. As to the interim reports, they were filed in compliance with 18 U.S.C. 2518(6). If interim reporting by a police officer were a sufficient "application," then the provisions of Section 2517(5) and Section 548 (b) would be superfluous. Quite obviously, the "subsequent application" envisioned by the Senate Report must

contain a substantial basis from which to allow the court to resolve the difficult *Marron* issue, including the fact that the search that revealed the other criminalty was proper in scope, that it was undertaken in good faith and proper in all other respects. The application must be detailed and precise in this regard, something more than a short rendition of some seizures by a monitoring police officer. Moreover, insofar as it appears from the interim reports in this case, police appear to have been intentionally seeking out not merely narcotics calls but any kind of unlawful communication. That kind of monitoring practice, to be distinguished from the inadvertent or unstoppable overhearing of such unauthorized communications, poses *Marron* problems of precisely the kind to which Sections 548(b) is directed. Also, upon receipt of the interim reports, Judge Parker was not requested to render a formal *Marron* ruling nor make any such inquiry, for quite clearly he did not view the reports as constituting a formal application under Section 2517(5) or Section 548(b). And finally, all of this was concealed from Chief Judge Greene, who had no idea of the interim reports and their contents when he reviewed and approved the September 28 application.[6]

Finally, the D.C. Circuit appears to render something of an implicit approval to the seizure of other-crimes con-

[6] As to the employment of the August 18 pen register application to Judge Parker for those purposes, much the same may be said. The pen register application was never intended to constitute an application for disclosure in conformance with Section 2517(5) or Section 548(b). Hence, no reference at all to the narcotics character of the July 27 tap was made. No reference to the monitoring practices of the agents, the specific character of the seizure, the general conduct of the tap, or any other information relevant to the *Marron* inquiry was given. Judge Parker was never caused to face the *Marron* issues nor make the required rulings as a predicate for dissemination. And no such findings appear. As we have indicated, all of this remained a mystery to Chief Judge Greene, when faced with the 16th Street tap application late in September. The Government omitted to raise even the slightest hint of the problem when obtaining from him the authorization to intercept.

versations without any effort at minimization, ruling that "(l)ike an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villiany [sic] need not ignore such evidence." (Appendix at 13a.) That, of course, begs the question of whether indeed the overhearing of the gambling communications in this case was intended by the officers from the beginning or whether the communications were come upon "unexpectedly" and incidentally as if in plain view. And this decision—about the manner by which the tap was executed—is a decision that Section 2517(5) requires be made "as soon as practicable" after the filing of a proper application. It has never yet been made in this case because the Government has filed nothing. And that is a patent violation of the federal statute.[7]

[7] As regards the local statute, which has ever more rigorous requirements concerning immediate application for use and dissemination of other-crimes material, the panel reasons that the statute applies only to information received "while engaged in intercepting wire or oral communications in the manner authorized by this subchapter." (Appendix at 15a.) Since the July 27 tap was a federal tap, the panel concludes that Section 548 of the local statute never thereafter came into play. We believe the Court's ruling in this regard effectively guts the local wiretapping statute. There is no question but that local police conducted all wiretaps in this case, getting some under the federal statute and ultimately getting the final tap under the local statute. One may properly argue that the Narcotics Squad of the MPD, pursuant to Section 548(b), was required to make expeditious application to the Court prior to its dissemination of the gambling seizures, so that an appropriate *Marron* determination could be made. In any event, the Gambling Squad upon receipt of the information from the narcotics tap was clearly governed by Section 548(b) and had strong affirmative obligations to make expeditious application to a judge for use of the gambling communications. Finally, under no circumstances could the Government simply sit back, assert that its conduct was to be governed solely by the federal statute, and omit to raise the matter with Chief Judge Greene when applying for a tap under the local statute.

Moreover, the Government has extraordinary discretion in the District of Columbia to pick its forum, its statutory wiretap scheme and the investigative agency through whom to conduct the tap. It can alter the rules of the game to fit its advantage almost at will. Whatever the utility of that kind of procedure, to allow local law

We conclude this section with two additional observations. First, the switch from Judge Parker to Chief Judge Greene in combination with the failure to tell Chief Judge Greene of the suspect origin of the first gambling calls creates something of a problem to the Government. Both the Government and the panel resolve it by asserting that a local wiretap was necessary for the gambling offense, a local crime; thus, the move to a local judge was also necessary. (Appendix at 6a.) That is not the law, for 23 D.C. Code 541(7) plainly empowers federal judges, as well as Superior Court judges, to authorize wiretaps under the local statute. There was no reason to leave Judge Parker in midstream and to file incomplete applications with Chief Judge Greene. The panel's effort to construct such a reason from the use of the local wiretap statute is contrary to the explicit provisions of that law.

Second, the Circuit panel leans heavily on the failure of appellants through their trial counsel to raise these issues below. (Appendix at 16a-18a.) The issues in fact were raised before Judge Jones, but not until the presentence period. The strength of the issues did not become apparent until *United States* v. *Moore*, *supra*, was

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enforcement personnel to be immune from rigorous local statutory proscriptions regarding the use of wiretapping material, merely because a federal label has been placed on a case, is to render the local provisions virtual nullities. Once the Government selects as its principal law enforcement agency the local police force, it must assure that such local officials comport their conduct with local statutory directives as well. That is surely no great burden. This is in fact what Congress in Section 548(b) intended. Section 548(b), with its tough disclosure and use requirements, is not limited only to interceptions conducted "pursuant" to the local statute. It directs its commands to all police officers engaged in wiretaps that are conducted "*in the manner authorized by this subchapter.*" (Emphasis supplied.) Contrary to the panel's analysis, this indicates something of an intention to encompass MPD dissemination and use of communications obtained from federal taps conducted "in the manner" of those authorized by the local statute.

decided in May of 1975, about four months after trial. New counsel had also entered the case. Counsel endeavored to apprise the trial court of the problem and make the necessary record for full appellate adjudication of the matter in pleadings filed prior to sentence. The Government as well filed its response and met the issue directly.

The record on the issue has been and is now a full one. It reveals plain error of substantial magnitude. It reveals matters that may ultimately be the subject of collateral attack. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333 (1974). The administration of criminal justice surely has not suffered by the consideration of this issue, particularly since the Government is unable to identify any prejudice to its position. And the issue of the extent to which the Government must rigorously conform its conduct to the other-crimes provisions of both the federal and the District of Columbia wiretapping statutes is an important and recurring federal question that, as we have indicated, directly affects both the constitutional and statutory foundations of court-authorized wire interception.

II. The decision of the Court of Appeals that the target identification provisions of the District of Columbia wiretap statute were not violated as to petitioners Byers, Johnson and Jones conflicts with the decision of this Court in *United States* v. *Kahn*, 415 U.S. 143 (1974).

Petitioners Byers, Johnson and Jones were not listed as targets in the September 28, 1973 interception application or in the order of Chief Judge Greene that issued thereafter. It is the contention of these three petitioners that the Government had clear probable cause to believe that criminal conversation of each would be intercepted by the September 28 interception; that the Government was bound by 23 D.C. Code 547(a)(2)(D) and 23 D.C.

Code 547(e)(1) to identify in its application these petitioners as targets; and that the decision of the Court of Appeals that such target identification need not have been forthcoming conflicts with the decision of this Court in *United States* v. *Kahn*, 415 U.S. 143 (1974). These three petitioners thus seek the issuance of a writ of certiorari on this second point.

An integral part of the federal interception-authorization procedure is the requirement, codified in Section 2518(1)(b)(iv) of Title 18, that the tap application contain a "full and complete statement" of:

> the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . .

The District of Columbia counterpart to Title III was passed in 1970 and provided even more rigorous provisions for local law enforcement use in the area of court-authorized wire interception. Section 547(a)(2)(D) of Title 23 of the D.C. Code provides that a local tap application contain a "full and complete statement" of:

> the identity of the person, if known, who committed, is committing or is about to commit the offense and whose communications are to be . . . intercepted.

These provisions were "fashioned to satisfy the Fourth Amendment's particularity standard as enunciated in the wire-tapping context by the Supreme Court in *Berger* v. *New York*, 388 U.S. 41, 58-60 . . . and *Katz* v. *United States*, 389 U.S. 347, 354-356 . . . ."[8] Compliance with the target identification provisions has been held to be "a statutory precondition to a valid intercept order."[9]

[8] *United States* v. *Moore*, *supra* at 493.

[9] *United States* v. *Bernstein*, 509 F.2d 996, 1001 (4th Cir. 1975); See, also, *United States* v. *Moore*, *supra* at 497.

Failure to make proper identification of target subjects in the tap application renders the tap result suppressable as to those wrongly omitted from the application.[10]

This Court, in *United States* v. *Kahn*, 415 U.S. 143 (1974), put its own imprimatur on this notion, vacating the conviction of a defendant for whom probable cause did not exist at the time she was named as a target of the interception and commenting in the process:

> Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is "committing the offense" for which the wiretap is sought. *Id.* at 155.

That not having been done in *Bernstein* or *Moore*, suppression was required.[11]

As to petitioners Byers and Johnson, the information known to the Government tying them to the suspected gambling operation was overwhelming. The Government in its own appellate brief conceded that "there may have been probable cause to believe that Byers was involved in the illicit gambling enterprise." (Government's Brief at 46-47.) The D.C. Circuit itself stated that "(i)n all candor, we must note that the affidavit contains a good deal of circumstantial data tying Byers and Johnson to Madre and/or the 16th Street address and that the officer filing the affidavit found it sufficient to support the listing of both as 'apparent principals' in the gambling business." (Appendix at 20a-21a.) Indeed the panel concedes further that the Government knew by probable cause that Byers was the "bag man" and that he delivered money and bets between the "office" and the

[10] *Id.*

[11] Other circuits have ruled in accord with *Bernstein* and *Moore*. See, *United States* v. *Donovan*, 513 F.2d 337 (6th Cir. 1975). Compare *United States* v. *Doolittle*, 507 F.2d 1368 (5th Cir. 1975), *aff'd en banc* 518 F.2d 500 (1975).

"books" on the street. (Appendix at 21a.) The panel reasons that all of this notwithstanding, "there was little or no reason to expect that his conversations would be overheard" over the tapped "office" phone. (Appendix at 21a.) We know of no case in which so fine a line was drawn or in which a court has ruled that probable cause of membership in a conspiracy and use of its physical premises was not literally tantamount to probable cause that the member would communicate criminal conversations over the premise's phones. Under any reasonable application of existing probable cause doctrine, probable cause was here present as to Byers.

Indeed, on August 18, Judge Parker himself found probable cause not merely that Mr. Byers was involved but that his voice would be one of those on the 16th Street phone and that he used the phone. See, Pen Register Order of August 18, 1973. The panel has omitted this finding by Judge Parker in its analysis. It contradicts directly the notion that probable cause did not exist. Indeed, it represents an assertion by the Government in August 1973 that probable cause to believe Byers would use the phone did exist. The Government can hardly disavow that position now.

As to Johnson, the panel opinion is factually in error. It asserts that Johnson had not been seen near the 16th Street "office" that was tapped "since August 16." According to the pen register affidavit, however, Johnson was seen there on August 17. He was seen on that date leaving the premises on 16th Street with Ms. Madre, the putative target of the tap. The panel opinion omits the several communications intercepted on July 27 and thereafter showing Johnson to have allegedly participated in the Madre gambling enterprise. Certainly wiretap cases are legion in which individuals were held properly targetable with far less known about them than was known of these petitioners. See, *e.g.*, *United States* v. *James*, 494 F.2d 1007 (D.C. Cir. 1974).

III. The decision of the Court of Appeals that the notice provisions of the District of Columbia wiretap statute were not violated as to petitioners Byers, Jones and Matthews erroneously resolves an important question of federal law that has not been and should be decided by this Court.

The record is clear that three petitioners—Byers, Jones and Matthews—never received formal notification of the tap as required by 23 D.C. Code 550(a). As to Byers and Matthews, no notice letters or inventories were even sent to them. It is equally clear that the Government knew that the voices of these two petitioners had been intercepted. The panel found "technical noncompliance" with the statute but determined that *United States* v. *Giordano*, 416 U.S. 505 (1974) did not require the "mechanistic suppression of evidence" that petitioners sought. (Appendix at 27a.) Cases in this area proliferate and are in disagreement; some hold that indeed suppression is required even in the absence of a showing of prejudice. See, *e.g.*, *United States* v. *Donovan*, *supra*; *United States* v. *Chun*, 503 F.2d 533 (9th Cir. 1974).

In holding to the contrary and ruling that prejudice is required, the panel deviates from the rulings of the Sixth and Ninth Circuits and adopts what is essentially a catch-22 approach: a defendant may successfully move to suppress only if he has no actual notice of the tap; without actual notice of the tap, however, a defendant will never move to suppress. It should be apparent that in the notice area, there is almost by definition never any prejudice. Once the defendant learns of the absence of notice to him, he knows of the tap and the need for him to move against it. A defendant either knows too much or too little. So unless suppression is a vehicle to compel compliance with notice provisions and assure the orderly and full inventory notice mandated by the statute, the statute's notice provisions are simply unenforceable against repeated violation. We do not believe this

kind of enforcement of basic constitutional guarantees rigorously built into the wiretapping statute constitutes the "draconian insistence on formal compliance" the panel asserts. (Appendix at 27a.) To the contrary, the statute and this Court in *Giordano* recognize no compliance other than "formal" compliance, at least partly for the reason that to do otherwise would allow the Government the kind of catch-22 approach utilized in this case.

CONCLUSION

For these reasons, petitioners respectfully ask that the writ of certiorari issue.

Respectfully submitted,

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August 30, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1523

UNITED STATES OF AMERICA

v.

MELVIN JOHNSON, SR., APPELLANT

No. 75-1524

UNITED STATES OF AMERICA

v.

ODESSA MARIE MADRE, APPELLANT

No. 75-1525

UNITED STATES OF AMERICA

v.

JOHN S. MATTHEWS, APPELLANT

No. 75-1526

UNITED STATES OF AMERICA

v.

CLYDE N. JONES, APPELLANT

No. 75-1527

UNITED STATES OF AMERICA

v.

GEORGE BYERS, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(Crim. 74-372)

Argued 25 February, 1976

Decided 21 June 1976

Roger E. Zuckerman, with whom *John Hurley* and *William Garber*, were on the brief for appellants.

Judith Hetherton, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Timothy J. Reardon, III*, Assistant United States Attorneys, were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, MACKINNON and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The five Appellants come before us to challenge convictions, rendered on a stipulated record, under federal and District of Columbia anti-gambling statutes.[1] Appellants neither dispute the fact-

[1] Appellant Melvin Johnson was convicted of operating an illegal gambling business, in violation of 18 U.S.C. § 1955 (Supp. IV, 1975). Appellants Odessa Marie Madre, John S. Matthews, Clyde N. Jones, and George Byers, were convicted of operating a lottery know as the numbers game, in violation of 22 D.C. Code, § 1501 (1973). The statutes are essentially similar except that under the federal statute the business being done must average more than $2,000 per day.

ual basis on which the court rested its judgments of conviction, nor challenge the criminal statutes under which the prosecutions were brought, on their face or as applied.[2] Rather, this appeal focuses entirely upon the denial of a motion to suppress evidence obtained, directly or indirectly,[3] through a wiretap authorized on 28 September 1973. In all, three different theories in support of exclusion are raised, one by all Appellants, and the other two by three Appellants each. Because the arguments raised relate to the intricate procedural requirements of the federal[4] and local[5] wiretap statutes, we must preface our legal discussion with a fairly full presentation of the complex circumstances of this case.

I. FACTUAL BACKGROUND

The arrests and indictments of Appellants were the culmination of a police investigation spanning a period of several months. During that time, officers of the Washington Metropolitan Police Department four times sought and received judicial approval for limited telephone surveillance under the federal and local wiretap statutes. It is admission of the fruits of the final authorized in-

[2] Chief Judge Jones' judgment in the case is set forth in a three-page memorandum, issued 24 January 1975. *App.* at 180-82.

[3] In addition to recordings of numerous gambling conversations, the wiretap provided investigators with information supporting warrants for the search of sixteen premises. In the execution of these warrants on 12 October 1973, three of the Appellants were arrested and various gambling records were seized.

[4] 18 U.S.C. § 2510-20 (1970).

[5] 23 D.C. Code §§ 541-56 (1973).

terception which Appellants object to here. However, the statutory argument for suppression requires us to consider the chain of events leading up to the final wiretap, to determine whether the procurement of approval for that interception was a proper use of the information previously obtained.

For our purposes, the procedural history of this case begins on 30 April 1973, when an officer of the police narcotics branch applied to U.S. District Judge Barrington Parker for authorization to install a pen register[6] on private telephones at two separate addresses. The four-page supporting affidavit detailed the officer's reasons for believing that the pen registers would greatly facilitate an on-going investigation into illicit narcotics trafficking.[7] The court ordered authorization of the pen registers for a period of twenty-one days, and directed the Assistant United States Attorney to provide the court with interim progress reports on the seventh and fourteenth days.[8] The record contains no indication of noncompliance with this instruction, designed to permit the court to monitor the investigation each week, but is silent as to the form or content of any reports that were made.

On 27 July 1973 application was again made to Judge Parker, this time for authorization of three wiretaps on telephones located at the two addresses where the previous pen registers had been approved. The application, including an eighteen page affidavit, was submitted by the same officer who had sought the pen registers, and set forth his reasons for believing that the phones were being used in the illegal acquisition and distribution of heroin and cocaine.[9] Judge Parker authorized the wire-

[6] A pen register is a device which records only the numbers of telephones dialed from the phone on which it is placed.

[7] *App.* at 1-4.

[8] *Id.* at 5-7.

[9] *Id.* at 8-30.

taps for a period of twenty-one days,[10] and directed that progress reports be given on the seventh and fourteenth days. Such reports were filed with the court on 3, 9, and 21 August, and are before us on this appeal.[11]

As related to this appeal, the 27 July wiretap provided two important pieces of information. First, the thirty-seven narcotic-related calls intercepted during the first eleven days of the tap confirmed the applying officer's belief that the phones were being used to facilitate the narcotic traffic.[12] Second, the much greater number of gambling-related calls intercepted during this period, including many to telephones at 1900 16th Street, N.W., provided the police with information as to an illicit gambling ring, apparently working out of the 16th Street address.

On 18 August 1973, as a result of the information thus obtained, an officer of the gambling unit applied to Judge Parker for authorization to install pen registers on two second floor phones at the 16th Street address. The accompanying twenty-three page affidavit mentioned four persons as apparent principals, including Appellants Byers, Madre, and Johnson, and set forth in detail the officer's reasons for believing that those telephones were being utilized by an illegal numbers operation.[13] On the strength of this affidavit, Judge Parker granted the requested authorization for a twenty-one day period, requiring, as before, two interim progress reports.[14] The

[10] *Id.* at 31-34.

[11] *Id.* at 188-98. These reports clearly indicate how many of calls intercepted each day on each phone, and the general subject matter with which they dealt.

[12] For no reason which appears from the record, not a single narcotic related call was intercepted during the last nine days of the taps. *Id.* at 188-98.

[13] *Id.* at 36-59.

[14] *Id.* at 60-62.

record is unenlightening as to the nature of any reports that were filed.

On 28 September 1973, application was made, this time to Chief Judge Harold Greene of the District of Columbia Superior Court, for the wiretap whose fruits Appellants now ask to have suppressed.[15] The targets of the tap were the two telephones at the 16th Street address which had been the object of the most recent pen register. The thirty-five page supporting affidavit, filed by the same gambling unit officer who filed for the pen registers, set forth in some detail the officer's reasons for believing that the two numbers at that address were being used as part of a gambling enterprise in violation of 22 D.C. Code § 1501).[16] The factual evidence relied upon included police surveillance reports, statements by unidentified informants, and detailed information[17] collected in all three of the previous intercepts.

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[15] Appellants strongly argue that the shift from the U.S. District Court to the D.C. Superior Court was somehow a "bad faith" maneuver by the Government to gain some advantage or evade some federal statutory obligation. We look at this shift quite differently. As will be seen by our discussion of the federal law, the Government was careful in fulfilling its obligations under the law and to Judge Parker. He had received interim and final reports on the pen register and wiretaps for the narcotics phase of the investigation and on the pen register for the gambling phase. There is no indication that an application for a gambling wiretap, on the basis of the gambling information uncovered in the pen register for gambling and in the narcotics wiretaps, both authorized by Judge Parker, would not have been approved as readily by him as by Chief Judge Greene of the D.C. Superior Court. As it was, the Government at this time decided that such prosecution as it would be able to bring would most likely be under the D.C. Code provisions relating to gambling. Hence, it was proper to ask a D.C. judge to approve the installation of the wiretap, even if that meant an additional burden of familiarizing a new judge with the details of a several months' long investigation.

[16] *Id.* at 68-102.

[17] *Id.* at 84-96. The affidavit also made reference to information collected through a third pen register on two phones at a different Washington address, which was authorized on 3 August 1973 by Superior Court Judge Edward Daley. *Id.* at 85-86.

All but Appellant Matthews are mentioned by name in the affidavit, with Appellant Madre cited frequently as the focal point of the investigation. The affidavit explicitly stated the type of intercept (wireap or pen register) involved in each previous instance, the telephones to which they were applied, and when and by whom they were approved. However, neither it nor the application itself stated that the 30 April and 27 July intercepts had been pursuant to a narcotics investigation.

Chief Judge Greene issued an order authorizing the tap for a period of fifteen days, on his finding of "probable cause to believe that Odessa Marie Madre and others suspected yet unknown" were operating a gambling business in violation of District of Columbia law.[18] The ensuing interceptions made possible recordings of the voices of all five Appellants, and provided the police with substantial new information on the existence and nature of the gambling enterprise operating out of the 16th Street address. On the basis of this information, a number of search warrants were obtained. Appellants were arrested during and after the execution of those warrants on 12 October 1973.

Prior to the 28 June indictments from which the present convictions resulted, Appellants, and several other parties arrested in the same investigation, engaged in lengthy plea negotiations during which they were all represented by a single lawyer, Meredith Coffman. The record contains uncontradicted assertions (1) that during those plea negotiations, in November or December, there took place a discovery conference attended by all

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[18] *Id.* at 103-106. The order required the Assistant U.S. Attorney to provide the court with interim reports on the fifth and tenth days. The record is again unenlightening as to when and what reports were actually made.

but Appellants Byers and Madre, at which the wiretap evidence against each was discussed,[19] and (2) that within a week of the execution of the search warrants—and three weeks of the authorization of the final wiretap—Mr. Coffman was supplied with the affidavits offered in support of both the search warrant and the final wiretap order.[20] Each contained transcripts of a number of intercepted gambling conversations, though only Appellants Johnson, Jones, and Madre were definitely identified as taking part in any of the excerpted conversations. As noted above, the affidavit in support of the 28 September wiretap referred to all but Appellant Matthews as objects of surveillance by the police gambling unit.

Further, on 4 January 1974, by order of Chief Judge Greene, registered letters giving notice of the wiretap were sent to 26 subscribers to telephone numbers which had been called from the tapped phones, at the addresses where the phones were located. Among these subscribers were Appellants Madre, Johnson, and Jones. The letter to Jones may not have reached him, since the receipt was returned unsigned. And no such letters were sent to Appellants Matthews and Byers, because no number subscribed to by them was dialed from the tapped phones during the period of the intercept.[21]

Appellants' motion to suppress, which is the sole issue before us, was argued on 9 December 1974, and denied as to Appellants Madre, Johnson, and Jones at that time. It was denied as to Appellants Matthews and Byers on 16 December 1974. The case came for trial to the court on a stipulated record, on 24 January 1975, from which emerged the convictions now under challenge.

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[19] Government Opposition to Motion to Suppress at 9, *App.* at 117.

[20] Transcript of Suppression Motion Hearing, 9 December 1974, at 60-61.

[21] Government Opposition to Motion to Suppress at 7, *App.* at 115.

II. Grounds of Appeal

Appellants present for our consideration three arguments in support of their motion to suppress the fruits of the 28 September 1973 wiretap. Because the fruits of that tap constitute the bulk of the incriminating evidence submitted by the Government,[22] it is clear that the reversal of the denial of the suppression motion on any ground would require reversal of the convictions of the Appellants raising the contention.

A. *Alleged violation of 23 D.C. Code § 548(b) and 18 U.S.C. § 2517(5), in failing to apply for judicial permission to use the fruits of the 27 July 1973 narcotics wiretap in seeking authorization of further telephone surveillance relating to gambling.*

The "first-rank contention" advanced by all Appellants is that the use of gambling conversations recorded during the 27 July narcotics wiretap, in securing approval of the 18 August and 28 September intercepts, was in violation of federal and, in the latter instance, District of Columbia statutes requiring judicial approval prior to use of other-crimes evidence. They argue that this violation of the prior approval requirement necessitates exclusion of all fruits of both interceptions. For several reasons which we will discuss, we find no basis for such suppression either in either the federal or the local District of Columbia Statute.

1. *18 U.S.C. § 2517*

This section of the federal wiretap statute describes the uses properly to be made, by law enforcement officers and others, of information acquired under a federally

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[22] *See* Index of Record (summarizing the Government's Evidence), *App.* at 153-79.

authorized intercept.[23] Clauses 1-3 provide respectively that such information may be (1) disclosed, in the line of duty, to another investigative or law enforcement officer; (2) used as appropriate in the performance of one's own duties; or (3) disclosed in the form of testi-

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[23] 18 U.S.C. § 2517 (Supp. IV, 1974) Authorization for disclosure and use of wire or oral communications.

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communications or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provision of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
>
> (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

mony in any federal or state proceeding. Clause 5 provides that where the information in issue relate to offenses other than those specified in the order of authorization, the uses discussed under Clauses 1 and 2 are uneffected, but prior judicial application must be made before the testimonial use discussed in Clause 3.

The section 2517 use provisions are applicable to the 27 July 1973 narcotics wiretap, which was approved by a federal judge, in furtherance of an investigation of a federal offense, on authority of the federal wiretap statute. We conclude, however, that the challenged use of the fruits of 27 July wiretap violated neither the letter nor the spirit of the statute. The statute requires prior judicial approval for use of other-crimes fruits of a wiretap, only where the information is to be offered in testimony at a federal or state proceeding.[24] Prior application and approval for this type of use is desirable in order to assure that rights will not be affected by information obtained in violation of the Fourth Amendment or the wiretap statute. The writers of the statute

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[24] The proposed provision (2) envisions use of the contents of intercepted communications [without prior application], for example, to establish probable cause for arrest, to establish probable cause for a search, or to develop witnesses.

S. Rep. No. 1097, 90th Cong., 2d Sess. 98, (1968). This language clearly indicates that a hearing on a warrant application is not the type of proceeding to which Clause 5 extended the prior application requirement. *See United States* v. *Moore*, 513 F.2d 485, 501 n. 48 (D.C. Cir. 1975).

See United States v. *Vento*, —— F.2d ——, —— (3d Cir. 16 March 1976) (slip op.), where the court concluded that:

> [s]ince Congress intended subsection (2) to include applications for search warrants, it would appear, equally, that an application for a wiretap authorization was intended to fall within the ambit of subsection (2) as a "use . . . appropriate to the proper performance of . . . official duties," rather than within the scope of subsection (3), which focuses on the use of wiretap evidence at trial.

Slip op. at 21.

have apparently concluded that the balance of police efficiency with the need for safeguarding personal privacy calls for exclusion of the fruits of illegal seizures from admission at trial, but does not demand routine judicial review prior to that time, at every stage of an investigation. It thus suffices under the statute that we and the district court be able to review the 27 July tap (and all its fruits) in rendering judgment on this or any criminal matter in which they may be introduced. Had actual other-crimes evidence from that tape been introduced at the trial, the statute would have required previous application for judicial permission. However, since no recordings from the 27 July investigation were thus submitted in evidence, it suffices that the trial court review the chain of investigation for Fourth Amendment or statutory violations, at the time that allegedly tainted, indirect fruits of the tap were offered.

Lest there be any argument that the 27 July tap was itself somehow illegal as resting on mere pretense of a narcotics investigation, we hasten to point out the two ways in which the federal court exercised a post hoc check upon it. First, Judge Parker asked for and received progress reports during the course of the 27 July wiretap. These reports, broken into subject matter categories, clearly indicated that the phones tapped were being significantly used for narcotics transactions.[25] This dispels any inference that the initial affidavit was a sham or that probable cause for the 27 July tap was lacking. Second, were this not enough, Judge Parker was given a later opportunity for review, when application was made for the 18 August pen register. At that time he was presented with data from a narcotics wiretap and required to decide whether it could properly support a gambling investigation. This is precisely the issue which would have been decided on a special application under § 2517(5).

[25] *See* App. at 188-98.

Nor does any constitutional infirmity arise from the fact that the 27 July tap yielded much greater evidence of gambling than of narcotics activity. Officers attending a properly authorized, limited, and supervised wiretap have no obligation to close their ears to unexpected incriminating information on matters unrelated to their immediate investigation. They have a legal right to their position within electronic earshot of conversations over certain telephones within certain time limitations. Like an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villiany need not ignore such evidence.[26]

We thus conclude that there was no violation of the federal statute's requirements pertaining to use of other-crimes information acquired in a wiretap.

2. *23 D.C. Code § 548(b).*

The District of Columbia wiretap statute[27] establishes

[26] We recognize, of course, that there is an obligation on the part of judges and investigators to make reasonable efforts to minimize the interception of conversations unrelated to the original purpose of the tap. This obligation is of both statutory, 23 D.C. Code § 547(g) (1973); 18 U.S.C. § 2518(5) (1970), and constitutional dimensions. *Berger* v. *New York*, 388 U.S. 41, 59 (1967). However, we reject the contention that it is any part of this obligation to shut off one's recorder in the midst of a properly authorized and conducted interception, when unexpected incriminating evidence presents itself.

In fact, § 548(b) recognizes that when incriminating statements of other crimes are overheard they may be recorded and the statute provides for using such evidence in other criminal proceedings. *See* n.27 *infra*. Thus the statute negates any suggestion that it is improper to overhear such conversations. Cf. *United States* v. *Scott*, 516 F.2d 751, 756 (D.C. Cir. 1975), *cert. denied*, 44 U.S.L.W. 3562 (5 April 1976); *United States* v. *James*, 494 F.2d 1007, 1018 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

[27] D.C. Code § 548(b) (1973) Additional procedure for approval of interception of wire or oral communications.

[Footnote continued on page 14a]

procedures and requirements which are, for the most part, parallel to those set out in the federal statute, and are applicable to investigations of specified D.C. Code offenses. Some of the local statute's provisions are, in fact, stricter than the corresponding sections of the federal statute, and this court has previously stated in dicta that 23 D.C. Code § 548(b) requires prior approval for any use of other-crimes evidence resulting from a wiretap.[28] However, we need not rule on this point in

[27] [Continued]

(b) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized by this subchapter, intercepts wire or oral communications relating either to offenses other than those specified in the order of authorization or to offenses other than those offenses for which interception was made pursuant to subsection (a) of this section, he shall make an application to a judge as soon as practicable for approval for disclosure and use, in accordance with section 23-553, of the information intercepted.

23 D.C. Code § 553 (1973) Authorization for disclosure and use of intercepted wire or oral communications.

(a) Any investigative or law enforcement officer who, by any authorized means and in conformity with this subchapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use such contents or evidence to the extent that such disclosure or use is appropriate to the proper performance of his official duties.

(b) Any person who, by any authorized means and in conformity with this subchapter, has obtained knowledge of the contents of any wire or oral communication intercepted in accordance with this subchapter, or other lawful authority, or evidence derived therefrom, may disclose the contents of such communication or evidence while giving testimony under oath or affirmation in any criminal trial, hearing, or proceeding before any grand jury or court.

(c) The contents of any wire or oral communication intercepted in conformity with this subchapter, or evidence derived therefrom, may otherwise be disclosed or used only by court order upon a showing of good cause.

[28] *United States* v. *Moore*, 513 F.2d 485, 5021 n.48 (D.C. Cir. 1975).

order to conclude that the local statute has not been offended. For the § 548(b) language on which Appellants seek to rely explicitly confines the section's applicability to other-crimes information received "while engaged in intercepting wire or oral communications in the manner authorized by this subchapter." Thus whatever the other-crimes prior approval requirements of the D.C. statute, they apply only to wiretaps initially approved under that statute.

It appears to us entirely appropriate that this should be so. The purpose of the application requirement relating to other-crimes evidence is to assure that the initial authorization of the tap was proper and did not rest on unsubstantial assertions as a pretense for a general "seizure." As such, it is a prophylactic measure, statutorily adopted by the jurisdiction authorizing a wiretap, as one way of supervising the legitimate use of wire interception. It is not the only means of supervision available, however, as the use of interim reports by Judge Parker clearly indicates.[29] Thus, there is no reason to suppose that a less stringent prior approval requirement imposed by one jurisdiction should lead a jurisdiction with a more inclusive requirement to invoke its own statute before utilizing the fruits of the first jurisdiction's investigative efforts. It is enough that each jurisdiction should adopt appropriate procedures for supervising its own wiretaps, and that another jurisdiction utilizing the ultimate fruits of such a tap should look to the authorizing jurisdiction's statute while, of course, exercising constitutional scrutiny over the actual seizures at issue in that case.

[29] Both statutes provide for such interim reports as a means of supervision regularly available to judges authorizing wire interceptions. 18 U.S.C. § 2518(6) (1970); 23 D.C. Code § 547(h) (1973).

3. *Failure to raise objection before trial.*

Quite apart from the merits of Appellant's argument relating to prior judicial approval for use of other-crimes evidence, we hold that, in any event, they have lost the opportunity to raise the objection by failing to assert it at trial. The federal and local statutes, in essentially identical language, state that a motion to suppress wiretapped communications shall be made prior to the proceeding where they are to be introduced, unless there was no opportunity to make the motion or the party was not aware of the grounds of the motion.[30]

[30] 18 U.S.C. § 2518(10)(a) (1970) Procedure for interception of wire or oral communications.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding, in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the ground that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its fact; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion was granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determined to be in the interests of justice.

See United States v. *John*, 508 F.2d 1134, 1140 (8th Cir.), *cert. den.*, 421 U.S. 962 (1975).

23 D.C. Code § 551(b) (1973) Procedure for disclosure and suppression of intercepted wire or oral communications.

(b) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regula-

The obvious reason for this is to allow final resolution of the question of admissibility before undertaking the costs in time and energy which accompany a trial. It is clearly a reasonable requirement, infringing no constitutionally protected interest, since it makes exception for those instances where a party lacks a realistic opportunity to raise an objection in a timely manner.

Appellants offer no persuasive excuse for their failure to raise this, their "first-rank contention," at the suppression hearings. There is no reason to suppose that they lacked the factual knowledge necessary to formulate this objection in December of 1974, when the suppression hearings took place. Nor have they given us any reason to conclude that they are alleging the sort of plain error or defect affecting substantial rights which

tory body, or other authority of the Uinted States or the District of Columbia, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face;

(3) the interception was not made in conformity with the order of authorization or approval;

(4) service was not made as provided in section 23-547; or

(5) the seal prescribed by section 23-549(a) is not present and there is no satisfactory explanation for its absence.

The motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this subchapter and shall not be received in evidence in the trial, hearing, or proceeding. The judge, upon the filing of the motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

will be noticed for the first time on appeal.[31] To the contrary, they are presenting what we hold to be an incorrect theory for the invocation of a prophylactic statutory suppression rule, having nothing whatever to do with the question of guilt or innocence. We see no reason not to apply the statute's procedural requirement barring late assertion of grounds for suppression in such a case.

B. *Alleged violation of 23 D.C. Code §§ 547(a)(2)(D) and (e)(1), in omitting from the application and court order approving the 28 September 1973 wiretap the identification of Byers, Johnson, and Jones, as targets of the wiretap.*

Appellants Byers, Jones, and Johnson argue that the fruits of the 28 September wiretap must be suppressed as to them for the additional reason that they were not identified as targets in either the tap application or the order, as required under 23 D.C. Code § 547(a)(2)(D) and (e)(1).[32] Those sections, patterned on provisions in the federal statute,[33] require that the application and order include the identity of the person, if known, committing the offense and whose communications are to be intercepted.[34] The essentially identical federal require-

[31] *See* Fed.R.Crim.P. 52(b) (1973); *United States* v. *Smith*, 490 F.2d 789, 794 (D.C. Cir. 1974).

[32] Matthews does not contend that he should have been so identified. Madre is identified throughout both documents as the prime target of the investigation.

[33] 18 U.S.C. § 2518 (1)(b)(iv) and (4)(a) (1970).

[34] It is true that only the § 547(a)(2)(D) requirement pertaining to the application explicitly limits the requirement to persons "committing the offense" who are likely to be intercepted, and that the § 547(e)(1) requirement relating to the court's order seems on its face to require identification of all known persons likely to be intercepted. However, the Supreme Court has stated that since the judge issuing the order must rely primarily on Government counsel's application in formulating his own order, he can not have been

ment has been construed to require the identification of persons not merely upon a likelihood that they will be intercepted, but only when there is also probable cause to believe that they are committing the offense for which the wiretap is sought.[35] We take that two-pronged test to be applicable in this case.

As to the application, we see no need to decide whether the police were required to identify any of the three complaining Appellants, because we conclude that they have been fully identified within any sensible meaning of that word. While the police referred only to Appellant Madre and "others suspected yet unknown" in their formal five-page application, the attached thirty-five page affidavit, which is incorporated by reference, appears to recite all information which the police had garnered from their investigation, and contains the names of all the complaining Appellants.[36] This is clearly adequate identification to serve the statutory goal of forcing the police to identify the purpose and objects of their investigation with as much particularity as possible.

As to the order authorizing the tap, we conclude that Chief Judge Greene did not abuse his discretion in identifying only Appellant Madre and "others suspected yet unknown." In the case of each Appellant his problem

intended to bear a broader burden of identification. Thus only persons "committing the offense" and likely to be intercepted need be identified in either the application or the order. *United States* v. *Kahn*, 415 U.S. 143, 152 (1974).

[35] *Id.* at 155; *United States* v. *Bernstein*, 509 F.2d 996, 1002 (4th Cir. 1975).

[36] The affidavit refers to these Appellants by name and provides specific information concerning their activities, on the following pages:

Byers—6, 9, 11, 14, 15, 17, 29A, 29B;

Johnson—6, 9, 10, 13, 15, 17, 20, 21, 23;

Jones—7, 27

was a factual one—of determining the likelihood that (a) each one was involved in the gambling operation and (b) that his conversations would be intercepted. Our assessment of the facts as they appeared at the time of the 28 September application leads us to conclude that in each Appellant's case it was reasonable for Judge Greene to answer one or both of these questions in the negative.

As to Appellant Jones, the affidavit makes clear that police information at this time was extremely sketchy, and related to addresses, phone numbers, and police records corresponding to his name, but unconnected by corroborating observation to a single identifiable person. The 16th Street apartment where the tapped phones were located was rented to a fictitious person employed by an equally fictitious Clyde N. Jones Tailor Shop. District of Columbia police records indicated a Clyde N. Jones who had been convicted many years ago of gambling-related offenses. And the 18 August gambling pen register indicated that a telephone registered to Clyde N. Jones was called regularly and repeatedly from one of the tapped phones. What is notably absent is any observation of an actual person identifiable as Clyde N. Jones, or any other reason to believe that such a person existed and played a part in the gambling scheme. There being no such reasonable basis for concluding that Clyde N. Jones was more than a convenient alias, there was, *a fortiori* no reason to believe that his conversations would be intercepted.

In the cases of Appellants Byers and Johnson, intensive surveillance had revealed actual people with patterns of conduct intermeshing to some degree with Appellant Madre and the activities at the 16th Street address. In all candor, we must note that the affidavit contains a good deal of circumstantial data tying Byers and Johnson to Madre and/or the 16th Street address, and that the officer filing the affidavit found it sufficient

to support the listing of both as "apparent principals" in the gambling business.[37] Nonetheless, we uphold as reasonable the implicit conclusion reflected in the order, that probable cause was lacking to identify either as a target of the wiretap.

The sum of the information which the police had with respect to Byers indicated that he was the "bag-man" for the operation, delivering money and bets between the 16th Street "office" and the "books" distributed across the city. This role was indicated by specific informant testimony of a particular large pickup from a barbershop,[38] and was corroborated by repeated police observation of frequent short visits to the 16th Street address. In this capacity, Byers would have no occasion to utilize the telephones on which taps had been placed, and there was no reason to believe that he would call or be called to or from those phones while at another address. In short, while there may well have been probable cause to believe that Byers was deeply involved in the operation, there was little or no reason to expect that his conversations would be overheard.

In the case of Johnson, the information in the affidavit was less conclusive in linking him with the numbers operation and the use of the telephones in furtherance of it. Most of the accumulated information pertaining to him related to his apparent longtime association with Appellant Madre. There had been one call intercepted during the 27 July wiretap, during which Madre indicated that Johnson regularly went to the 16th Street "office" with her.[39] But Johnson had been seen with her in the vicinity of the office on only two occasions, and had not been seen at all near the office since 16 August.

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[37] *App.* at 76.

[38] *App.* at 73.

[39] *App.* at 87-88.

Even where, as here, the subsequent wiretap revealed that Johnson, not Madre, was in charge of the entire operation, we cannot fault Chief Judge Greene for concluding, on the existing record of known association and limited observation, that there was no probable cause to believe that Johnson was involved and would be intercepted.[40]

We therefore conclude that the application and order pertaining to the 28 September 1973 wiretap present no violation of 23 D.C. Code § 547 by failure to identify Appellants Byers, Johnson, or Jones.

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[40] The mere fact of association with a person engaged in illegal activities is, of course, insufficient to support a finding of probable cause, for present or any other purposes. *See United States* v. *Martinez*, 498 F.2d 464, 468 (6th Cir.), *cert. den.*, 419 U.S. 1056 (1974). It seems to us a close question whether, with the additional information accumulated by the police, probable cause should be found to exist and, however we would resolve the question in the first instance, we are unable to say that Chief Judge Greene abused his discretion in finding in the negative. Johnson's case is distinguishable from *United States* v. *Moore*, 513 F.2d 485, 495 (D.C. Cir. 1975), where the incriminating evidence in the hands of the police was greater in quantity and specificity than here.

It is also immaterial that a more intense investigation might possibly have given rise to probable cause to believe that Johnson was involved in the numbers operation and would be intercepted. *See Moore, supra*, at 498-99. "A requirement that the Government fully investigate the possibility that any likely user of a telephone was engaging in criminal activities before applying for an interception order would greatly subvert the effectiveness of the law enforcement mechanism that Congress constructed." *United States* v. *Kahn*, 415 U.S. 143, 153 (1974). So, more clearly, would a requirement of investigation of anyone generally associating with a suspect. Under both the federal and local schemes, an order would be defective for failure to make further conventional investigations only where such investigations might obviate the wiretap itself. *See* 18 U.S.C. § 2518 (1)(c) and (3)(c) (1970); 23 D.C. Code § 547 (a)(3) and (c)(3) (1973). In a numbers case such as this one, where the telephone is the critical instrumentality of the illegal enterprise, no reasonable argument can be made that further efforts would have made the wiretap unnecessary.

C. *Alleged violation of 23 D.C. Code § 550 and 18 U.S.C. § 2518(8)(d), by failure to provide inventory notice to appellants Jones, Byers, and Matthews within ninety days of the termination of the 28 September 1973 wiretap.*

Appellants Jones, Byers, and Matthews contend that the fruits of the 28 September wiretap must be suppressed as to them, because they were not served with formal inventory notice that their calls had been intercepted, as required by 23 D.C. Code § 550 and 18 U.S.C. § 2518(8)(d). We can dispense immediately with the federal statutory argument, since the controverted wiretap was authorized pursuant to the D.C. wiretap statute by a local judge in investigation of a D.C. Code offense—the federal statute is simply inapplicable. However, the local statute's inventory requirement is essentially identical, and clearly is applicable to the case before us.

That statute requires, *inter alia*, that a judge passing on a wiretap application give notice within a reasonable time, but not later than 90 days after termination of the tap, to persons named in the order and to such other persons as he may in his discretion find necessary in the interest of justice.[41] In attempted compliance with

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[41] 23 D.C. Code § 550 (1973) Inventory.

(a) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 23-548 which is denied, or the termination of the period of any order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine, in his discretion, are necessary in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application for an order of approval which was denied;

(2) the date of the entry of the order or the denial of the application for an order of approval;

[Footnote continued on page 24a]

that requirement, Chief Judge Greene in December of 1973 ordered that formal notice of interception be sent to twenty-six individuals listed as subscribers to telephones called from the 16th street address. These letters were sent on 4 January 1974, six days before the expiration of ninety days from the end of the tap. They were received by Appellants Madre and Johnson, who do not raise the inventory argument on appeal. Appellant Jones was sent such notice at the U Street address where a telephone was registered in his name, but the registered receipt was returned unsigned. Appellants Byers and Matthews were not sent such notice, since no telephone registered to either of them was called during the period of the tap.

With regard to Jones, we do not hesitate to conclude that the statute has been fully and formally complied with. On information provided by Government counsel, the court ordered that he be sent formal notice by registered mail, at the address which police had reason to believe was his residence. We hold that the statute requires no more than such a reasonable effort to reach persons whose conversations have been intercepted, and on that basis reject the argument as advanced by Jones.

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[41] [Continued]

(3) The period of authorized, approved, or disapproved interception; and

(4) whether during the period wire or oral communications were intercepted.

The judge, upon the filing of a motion, may in his discretion, make available to the person or his counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge, the serving of the inventory required by this subsection may be postponed.

Our discussion herein concerning § 550 is equally applicable to 23 D.C. Code § 551(a), which requires that wiretap evidence shall not be admitted where the inventory was served less than ten days before the proceeding, unless the ten day period is waived by court order.

As to Byers and Matthews, the issue is a bit more complicated. Although Government investigators apparently had reason to believe that their conversations had been intercepted,[42] their names were not submitted to Judge Greene prior to his order of inventory notice. Since we have above affirmed the exclusion of their names from the wiretap order, they would fall into the category of persons to be notified where justice so requires, within the discretion of the court. It is thus not clear whether Chief Judge Green could be faulted for failing to notify them, if he had information as to the fact and nature of their interception before him. However, where, as here, a judge has been denied the opportunity to exercise the discretion accorded him under the statute by the Government's omission "by oversight"[43] to inform him of known intercepted parties, a different and stronger argument for suppression is available.[44]

We are spared, by the facts of this case, the task of deciding whether the inventory requirement might be violated in such a situation. For the record in this case makes clear that all Appellants had actual notice that their words had been intercepted in the 28 September wiretap. And as we read the precedents advanced by both sides, actual notice is a bar to any suppression argument based on non-compliance with the inventory requirement, at least where the failure to give formal notice was not a deliberate act of either the court or the Government.

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[42] Transcript of Suppression Motion Hearing, 9 December 1974, at 67, 74.

[43] *Id.* at 67.

[44] *See United States* v. *Chun*, 503 F.2d 533, 540 (9th Cir. 1974), where the court held that the Government's failure to provide the judge with even a general description of the defendants so that he could properly exercise his discretion to notify them of the interceptions "contravenes both the spirit and the letter of § 2518 (8)(d)" of the federal Statute.

It has been freely conceded throughout this proceeding that Mr. Coffman, then attorney for all Appellants, was provided in mid-October 1973, with copies of the affidavits supporting both the 28 September wiretap and the subsequent search warrants, as well as the court orders themselves.[45] It has been further conceded that these materials reflected "what was done as far as the wire intercept was concerned," [46] and that during the pre-indictment period "everybody knew there was a wiretap." [47] In fact, the wiretap application contained the names of all but Appellant Matthews, as objects of the gambling investigation. The Government alleges further, and appellants do not contest, that a discovery meeting at which specific wiretap evidence was disclosed, took place well within the ninety day period.[48] It was attended by all but Appellants Madre and Byers.

Moreover, Appellants concede, even as they come before this court, that actual notice of interception was not lacking as to any of them.[49] Nowhere in their written and oral arguments do we find a claim that a lack of formal inventory notice denied any Appellant the opportunity to bring an early challenge to the wiretap procedure applied here. To the contrary, this third theory of appeal rests on a highly formalistic construction of the statute, which would exclude evidence for the most technical forms of non-compliance, however unintentional and however insignificant the effect on the rights of the persons involved. Because we see no purpose in suppressing the fruits of good faith investigative efforts for

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[45] Transcript of Suppression Motion Hearing, 9 December 1974, at 60-61.

[46] *Id.* at 24.

[47] *Id.* at 27.

[48] *App.* at 17.

[49] *Appellant's Reply Br.* at 25.

failure to give formal notice, where it is clear that actual notice has otherwise been timely received, we reject this argument as unpersuasive.[50] We find the precedents dealing with the inventory requirement, under the parallel federal statute, to be fully supportive of this position.

We rely primarily on *United States* v. *Wolk* [51] and *United States* v. *Bohn*,[52] which stand for the proposition that failure to comply with the inventory requirement is not grounds for suppression if the ends of that requirement have otherwise been achieved. Since all Appellants had actual notice well within the ninety day period, and thus had an opportunity to challenge the wiretap while the circumstances surrounding it were still fresh, we see little function that would be served by requiring further formal notice.[53] There being no assertion here of bad faith on the part of the Government, we need not determine whether this principle would hold in the case of deliberate non-compliance.

The cases advanced by Appellants as limiting or contradicting the holdings of *Wolk* and *Bohn*, do not support a contrary resolution of the case before us. Perhaps most importantly, we do not believe that *United*

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[50] We express no opinion whether non-compliance with the inventory provision would be condoned where the court would have to speculate as to whether the defendants were otherwise timely notified.

[51] 466 F.2d 1143, 1145-46 (8th Cir. 1972).

[52] 508 F.2d 1145, 1148 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975).

[53] Appellants argue that the mechanistic suppression of evidence for violation of any formal requirement would impose a discipline on investigative officers which would, in the long run, serve the goal of protecting individual privacy interests. While this observation may be correct as far as it goes, such a draconian insistence on formal compliance would have an obvious cost in investigative efficiency and the freeing of guilty persons. On balance, we see nothing to recommend such an interpretation, either in the statute or in the cases which have construed it.

States v. *Giordano*[54] requires suppression for technical non-compliance of the sort involved here, where it is demonstrable that there was no effect on the rights or interests of the defendants involved.

In that case, the Government had failed to comply with the federal statute's requirement that the Attorney General himself approve all wiretap applications. In concluding that some non-constitutional violations of the statute could be grounds for suppression, the Supreme Court set forth a rationale for distinguishing between suppressable and non-suppressable statutory violations.[55]

> [W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary remedy.

Finding the requirement of Attorney General approval to have been designated a central role in screening out inappropriate cases, the Court ordered suppression in a case where no such approval had been given.

The logic of *Giordano* is inapplicable to the case before us precisely because there was no failure here to "substantially implement the Congressional intention to limit the use" of wiretaps. The Attorney General approval requirement serves the unduplicable function of forcing the Government's No. 1 lawyer to commit himself as to the propriety of every tap applied for, and thus renders less likely applications which, for whatever reason, should never have been filed. But the inventory notice requirement is only one of several ways to the desired end of assuring intercepted parties a real opportunity to challenge a wiretap before all information concerning it is stale.

[54] 416 U.S. 505 (1974).

[55] *Id.* at 527.

Cases from other circuits which have reversed convictions for non-compliance with the inventory requirement do not conflict with the position we take today. In *United States* v. *Chun*,[56] the court reversed and remanded, in part for determination "whether the underlying statutory purpose behind the . . . formal notice provisions has been satisfied in spite of appellees' failure to receive such formal notice." On remand, the district court ordered the evidence suppressed on grounds suggesting that a different result would have obtained had actual notice been received within ninety days.[57] In *United States* v. *Eastman*[58] the affirmance of a suppression order turned on the deliberate character of the Government's non-compliance with the inventory provisions. No such deliberate non-compliance is alleged here. Finally, in *United States* v. *Donovan*,[59] a suppression motion was affirmed, based partly on the district court's explicit holding that the defendants had not been "otherwise notified that they had been intercepted."

We therefore reject the contention of Appellants Jones, Byers, and Matthews, that the fruits of the 28 September 1973 wiretap must be suppressed as to them, for failure to comply with the inventory requirement of 23 D.C. Code § 550.

III. Conclusion

For the aforementioned reasons, the convictions of all Appellants are

Affirmed.

[56] 503 F.2d 533, 543 (9th Cir. 1974).

[57] *United States* v. *Chun*, 386 F.Supp. 91, 95 (D. Haw. 1974).

[58] 465 F.2d 1057, 1062 (3d Cir. 1972).

[59] 513 F.2d 337, 343 (6th Cir. 1975).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

Criminal 74-372

[Filed Jun. 21, 1976, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 75-1523

UNITED STATES OF AMERICA

v.

MELVIN JOHNSON, SR., APPELLANT

No. 75-1524

UNITED STATES OF AMERICA

v.

ODESSA MARIE MADRE, APPELLANT

No. 75-1525

UNITED STATES OF AMERICA

v.

JOHN S. MATTHEWS, APPELLANT

No. 75-1526

UNITED STATES OF AMERICA

v.

CLYDE N. JONES, APPELLANT

No. 75-1527

UNITED STATES OF AMERICA

v.

GEORGE BYERS, APPELLANT

Appeals from the United States District Court
for the District of Columbia

Before: BAZELON, *Chief Judge*, MACKINNON and WILKEY, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the convictions of all appellants are affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 21, 1976

Opinion for the Court filed by Circuit Judge Wilkey.